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Supreme Court of the United States

OCTOBER 1943 TERM

No. 431

VINCENT RAYMOND DUNNE, JAMES P. CANNON, EDWARD PALMQUIST, MAX GELDMAN, OSCAR COOVER, EMIL HANSEN, ALFRED RUSSELL, GRACE CARLSON, HARRY DEBOER, FARRELL DOBBS, FELIX MORROW, KARL B. KUEHN, JAKE COOPER, CARLOS HUDSON, CARL SKOGLUND, ALBERT GOLDMAN, CLARENCE HAMEL and OSCAR SCHOENFELD,

Petitioners,

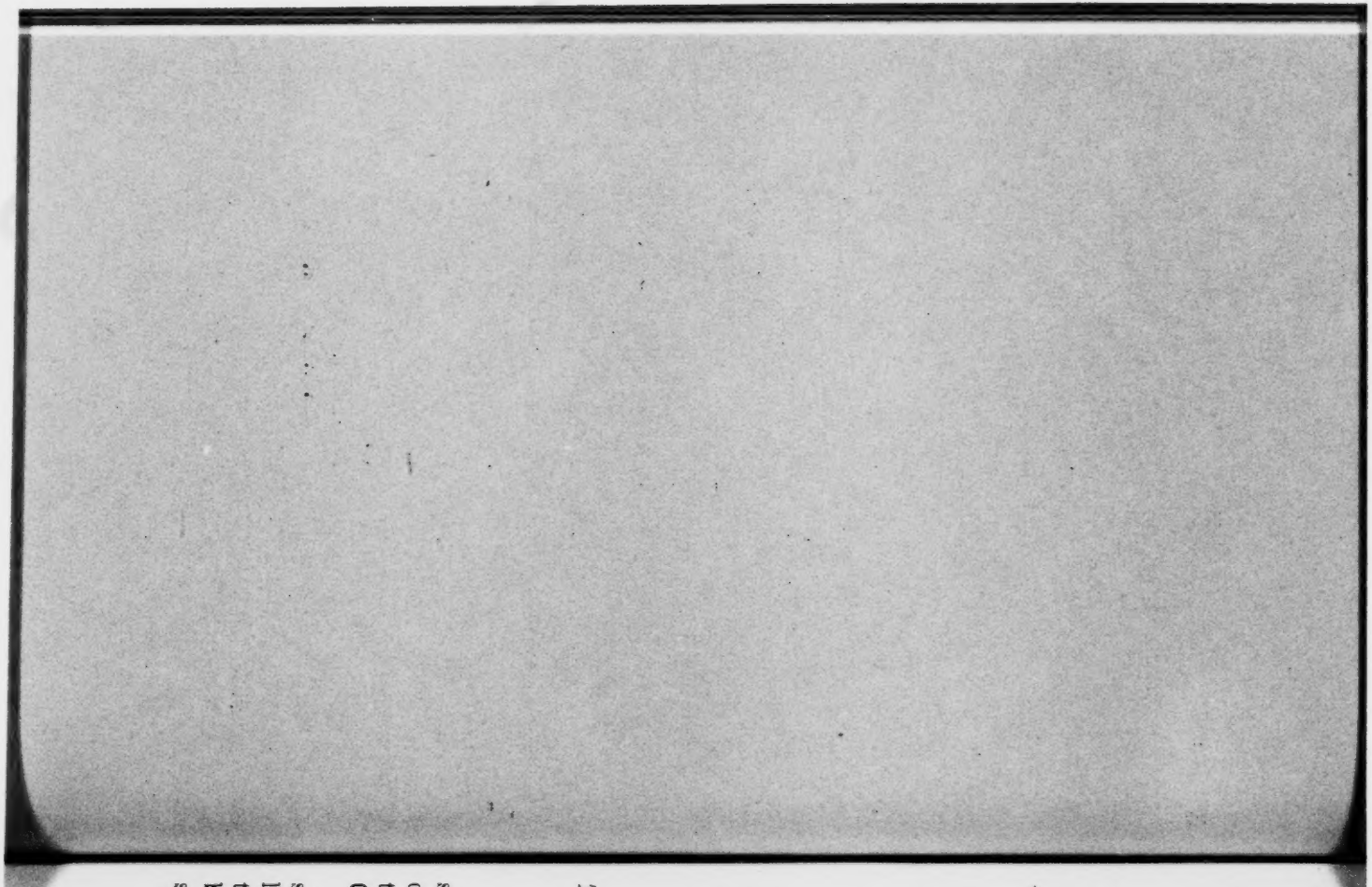
against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING

OSMOND K. FRAENKEL,
ALBERT GOLDMAN,
Counsel for Petitioners.



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To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioners respectfully pray this Court to reconsider its determination made on November 22, 1943, which denied petitioners' application for writs of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit to review a judgment of conviction.

Your petitioners respectfully submit that there is presented in these cases a serious question of constitutional law which should be passed upon by this Court involving the Alien Registration Act of 1940, a question which is bound to arise in further prosecution under this statute or similar statutes.

This question is whether or not the clear and present danger test first enunciated by this Court in *Schenck* v. *United States,* 249 U. S. 47, is applicable to a prosecution for conspiring to advocate the overthrow of the Government by force and to advocate disaffection in the armed forces. This question has never before been considered by this Court in relation to an Act of Congress.

The First Amendment to the Constitution of the United States prohibits the Congress from passing any law that shall "abridge" freedom of speech or of the press. Nevertheless the statute now under consideration makes it a criminal offense to express certain opinions. This is the third time that Congress has enacted laws of this character.

The first time was in 1798, when fear of foreign propaganda resulted in the Alien and Sedition Act. This Court never had occasion to pass on the propriety of the numerous convictions had under that law. For that great believer in freedom, Thomas Jefferson, being of the opinion that the law was unconstitutional as well as unwise, pardoned the sufferers from its enforcement.

The second Congressional enactment was the Espionage Act of 1917, passed during wartime, and by its terms limited to wartime. That statute was upheld by this Court in the *Schenck* case supra. But in upholding the law, Justice Holmes stressed two safeguards: that the law applied only to wartime utterances, which might be such a hindrance to the war effort "that their utterance will not be endured so long as men fight", and that the utterances could be punished only when they "are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent".

The third instance is the statute involved in the case at bar. This Court, by refusing to review these convictions, has, in effect, approved that statute as here applied. And it has approved it, though both the safeguards stressed by Justice Holmes in the *Schenck* case are here absent. Not

only is the statute itself applicable in peacetime, but the utterances which form the basis of the charge against petitioners were peacetime utterances. Moreover, the Trial Court refused to apply to this case the clear and present danger rule enunciated by Justice Holmes, despite motions at the trial and requests for instructions to the jury which properly raised that issue.

This result is the more remarkable and difficult to understand because this Court has so recently described the clear and present danger rule as the "minimum" constitutional guaranty (*Bridges* v. *California*, 314 U. S. 252) and has cited the rule with approval in many recent free speech cases. (See *Thornhill* v. *Alabama*, 310 U. S. 88, 105; *Cantwell* v. *Connecticut*, 310 U. S. 296, 311; *Schneiderman* v. *United States*, 319 U. S. ; *Taylor* v. *Mississippi*, 319 U. S. .) Moreover, the rule has been thought applicable to cases not dissimilar to the one at bar by two State appellate courts (*Klapprott* v. *State*, 127 N. J. Law 395; *Shaw* v. *State*, Okla. , 134 P. 2nd 999).

The courts below relied on the decisions of this Court that State criminal syndicalism laws are presumtively valid (*Gitlow* v. *New York*, 268 U. S. 652; *Whitney* v. *California*, 274 U. S. 357). That was the only contention made by the Government both at the trial and in the Circuit Court. We do not dispute that weight must be given to the legislative determination that certain words may be harmful.

Nevertheless, we submit that constitutional protection of freedom of speech cannot be preserved unless a defendant in a particular case can show that the legislative determination did not apply; in other words, that there was no clear and present danger in his case of the happening of the substantive evil aimed at. That was the view taken by Justices Holmes and Brandeis concurring in the *Whitney* case. No one has ever answered the logic and common sense of what Mr. Justice Brandeis there said:

> "Whenever the fundamental rights of free speech and assembly are alleged to have been invaded, it must

> remain open to a defendant to present the issue whether there actually did exist at the time a clear danger; whether the danger, if any, was imminent; and whether the evil apprehended was one so substantial as to justify the stringent restriction interposed by the legislature."

In this Court the Government has raised an entirely different point, namely, that the clear and present danger rule is never applicable to any statute affecting free speech, no matter how stringent it may be, provided that the statute required a finding that there was an intent to produce the substantive evid aimed at. In other words, by the mere insertion of the words "with intent", the constitutional protection of freedom of speech can be destroyed. It would make no difference under what circumstances nor at what remote time the accused person may have intended that his words should ripen into action. This Court has never heretofore sanctioned such a result. We can hardly believe that the quotation from the *Taylor* case contained in the Government's brief (p. 19) intended to establish so far reaching a consequence. If so, then for all practical purposes the clear and present danger rule is dead, unless perchance it have some vague ghostly life to be invoked by a formula not yet discovered by counsel.

In arguing that the clear and present danger rule is not applicable to this statute because of the insertion of the word "intent", the Government overlooks the fact that in effect the Espionage Act is the same. For the Espionage Act in all of the three subdivisions of its vital third section punishes acts only when "wilfully" done (see 50 U. S. C. A. 33). An act wilfully done is necessarily an act done with intent to produce the evil against which the statute is designed. As this Court held in *United States* v. *Murdock*, 290 U. S. 389, a defendant prosecuted under a statute which punished a wilful act is entitled to an instruction with regard to his intent. It seems to us to be merely a play on words to say that there is any substantial difference between a statute which punishes a person who says

or does something wilfully and one which punishes a person because he says or does something with intent that harm shall result. So, in effect, this case is the same as the *Schenck* case, unless this Court should reject the view of Justices Holmes and Brandeis that the presumption arising from the legislative determination is rebuttable.

The Court's refusal to review the case at bar thus leaves it uncertain whether the rule of the *Gitlow* and *Whitney* cases determines the result, as was urged by the Government in the Court below, or whether the result was reached on the basis of the Government's argument here, because the statute contained the word "intent". It is difficult to believe that this Court should have reached either conclusion without hearing full argument on a subject of such far-reaching importance. We respectfully suggest that even if this Court may have made up its mind beyond the possibility of change after argument, it is, nevertheless, in the public interest that the Court's reasons for its conclusions be stated. Otherwise neither the bench nor the bar nor the public can know what is the proper rule in such cases.

We therefore respectfully submit that a rehearing should be granted and the determination of this Court denying the application for writ of certiorari be set aside and a writ granted to review the judgment of conviction.

Osmond K. Fraenkel,
Albert Goldman,
Counsel for Petitioners.

Dated, December 1, 1943.